

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

VALLEY FORGE INSURANCE)
COMPANY,)
)
Plaintiff,)
) Civ. Action # 1:14-cv-00792-MRB
-v-)
)
FISHER KLOSTERMAN, INC.,)
)
Defendant.)
)

**DEFENDANT FISHER KLOSTERMAN, INC.’S OPPOSITION TO PLAINTIFF
VALLEY FORGE INSURANCE COMPANY’S MOTION FOR LEAVE TO FILE ITS
MEMORANDUM IN SUPPORT OF ITS DISPOSITIVE MOTION IN EXCESS OF
TWENTY PAGES AND LEAVE TO FILE IT UNDER SEAL**

Defendant Fisher Klosterman, Inc. (“FKI”) respectfully submits this opposition to Plaintiff Valley Forge Insurance Company’s (“Valley Forge”) Motion for Leave to File Its Memorandum in Support of its Dispositive Motion in Excess of Twenty Pages and Leave to File It Under Seal (“Motion”). Valley Forge’s Motion concerns its *second* motion for summary judgment in this litigation.

In ruling on Valley Forge’s *first* motion for summary judgment, this Court found that Valley Forge had a duty to defend FKI in the underlying litigation. Dkt.#81 at 30, 41. This Court also found that “Valley Forge has not demonstrated a right to recoupment of defense costs in this case” without showing that Valley Forge was relieved of its duty to defend due to FKI’s alleged breach of the cooperation clause. *Id.* at 41. As such, the only remaining questions in this case are (1) whether FKI cooperated with Valley Forge in the defense of the underlying action;

and (2) whether Valley Forge acted in bad faith. *Id.* at 41; Dkt. #54 at Counterclaims ¶¶152-181; Dkt.#82 at 27-28.¹

Despite finding that Valley Forge had a duty to defend FKI in the Valero Suit, this Court denied FKI's cross-motion for summary judgment on the duty to defend based on Valley Forge's own "conten[tion] that [Valley Forge] need[ed] additional time pursuant to Fed. R. Civ. P. 56(d) to conduct discovery on [the duty to cooperate] issue to fully oppose FKI's motion for summary judgment." Dkt.#81 at 29.

Valley Forge filed a motion for reconsideration of the Court's determination concerning its duty to defend. Dkt.#89. On June 22, 2016, this Court stayed discovery pending a determination of Valley Forge's motion for reconsideration. *See* Minute Entry dated June 22, 2016.

Now Valley Forge Insurance Company, despite having lost summary judgment on the duty to defend, and having represented to this Court that discovery was needed in order for there to be a determination on whether FKI satisfied its duty to cooperate, apparently intends to reverse field and file a motion seeking summary judgment on the duty to cooperate, even though Valley Forge told this Court, in opposition to FKI's own motion for summary judgment on the duty to defend, that discovery was needed to resolve that very issue. Discovery has been stayed since June 2016. FKI intends to oppose Valley Forge's motion for summary judgment, file a cross-motion for summary judgment, and opposes Valley Forge's Motion for leave to exceed the page limits. Given the extensive briefing that Valley Forge has filed on the issue of the duty to defend already, this Court's forty-two page decision on the cross-motions for summary judgment, and the fact that Valley Forge has represented to the Court that factual issues preclude

¹ This Court granted Valley Forge's motion for summary judgment on the duty to indemnify. Dkt.#81 at 41.

entry of summary judgment on the duty to cooperate, Valley Forge should not be afforded any additional opportunity to retrace the same ground – let alone more pages within which to do so.

Valley Forge's Motion for Leave to File Its Memorandum in Support of its Dispositive Motion in Excess of Twenty Pages and Leave to File It Under Seal should be denied.

Dated: March 16, 2016

By: /s/ Matthew A. Rich

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2016 the foregoing document was electronically filed with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel of record registered to receive electronic service to:

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